UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SECURITAS SECURITY SERVICES USA, INC., **Petitioner,** **and** **NATIONAL LABOR RELATIONS BOARD** **Respondent.**	**Case No. 16-60304**

PETITIONER'S REPLY TO THE NLRB'S OPPOSITION TO MOTION FOR SUMMARY REVERSAL

TO: THE HONORABLE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS:

I.

The National Labor Relations Board ("NLRB" or "Board") does not dispute that the law is settled in this Circuit as to whether class and collective action waivers in arbitration agreements governed by the Federal Arbitration Act violate the National Labor Relations Act. *See* NLRB Opposition at p. 3. And the Board does not contest that, under the controlling law of this Circuit, *D.R. Horton* and *Murphy Oil* require reversal of the Board's order. *See e.g. Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another

panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court."). Instead, the NLRB claims that the Court should place the case in abeyance—which the Court has already previously declined to do. *See* NLRB Opposition at p. 3

The NLRB also admits that the Court has granted summary reversal on this identical issue in several earlier cases, but it claims that the Court should not do so in this case because the NLRB *still might* file a petition for a writ of certiorari with the Supreme Court in *Murphy Oil USA, Inc. v. NLRB*, 808 F. 3d 1013 (5th Cir. 2015) ("*Murphy Oil*").[1] Simply stated, the Board has no argument on this issue, and Petitioner's Motion for Summary Reversal on this issue should be granted.

II.

The law of this Circuit is also settled on the issue of whether the arbitration agreements interfered with the right of employees to file charges with the Board. In *Murphy Oil*, the Court concluded "it would be unreasonable for an employee to construe [an arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite." *Murphy Oil*, 808 F.3d at 1020. Here, the agreements expressly provide in paragraph 1 that employees can file charges with

[1] *See e.g., SF Markets, LLC d/b/a/ Sprouts Farmers Market v. NLRB*, No. 16-60186 (July 26, 2016); *MasTec Servs. Co. v. NLRB*, No. 16-60011 (July 11, 2016); *24 Hour Fitness USA, Inc. v. NLRB*, Case No. 16-60005 (June 27, 2016).

the National Labor Relations Board "without limitation"; and there is even a link to the Board's website.[2]

The Board incorrectly downplays the force of a statement expressly informing employees of their right to file a Board charge. In addition to stating that it would be unreasonable to construe an agreement as prohibiting the filing of a charge when the agreement says just the opposite, the Court said it was not even necessary for an agreement to include an "express statement" informing employees that their "right to file Board charges remains intact", but "such a provision would assist" even "if incompatible or confusing language appears in the contract." *See Murphy Oil*, 808 F. 3d at 1019. The express statements in the agreements here, informing employees of their ability to file a charge with the NLRB, makes it undeniably clear that employees are not prohibited from filing a charge with the Board, and therefore, under *Murphy Oil*, it would be unreasonable for employees to construe the agreements as preventing them from filing a charge with the Board. Furthermore, the Board can point to nothing – neither in the agreements nor from the opinion in *Murphy Oil* – that would alter the analysis or distinguish the agreements here from the agreement and decision in *Murphy Oil*. Accordingly, summary reversal is appropriate on this issue also.

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[2] *See Securitas Security Services USA, Inc. and Charles Dunaway and Walter Linares*, 363 NLRB No. 182 (2016) (attached as Exhibit A)

III.

Summary reversal is appropriate on both of the issues in this case for the reasons stated above. However, even if the Court finds that summary reversal is not appropriate for both issues, the court may nevertheless resolve at least one issue through summary reversal. As the Board has admitted in its opposition, this is exactly what occurred in the *PJ Cheese* decision, on which the Board relies. The Court granted summary reversal on the class and collective action waiver issue but not on the issue of whether employees thought they could file charges with the Board. *See PJ Cheese, Inc. v. NLRB*, No. 15-60610 (June 16, 2016). In addition, a similar result was reached by the Court in *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613, 2016 WL573705 (5th Cir. 2016).

IV.

In accordance with this Circuit's precedent, reversal of the Board's Order is appropriate.

Dated: August 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 3, 2016, the foregoing Reply to NLRB's Opposition to Motion for Summary Reversal was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

/s/ Edward F. Berbarie
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